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HOUSE OF REPRESENTATIVES.

JOHN PICKET AND OTHERS.

LETTER

FROM

THE SOLICITOR OF THE TREASURY,

TRANSMITTING

The result of his examination of the case of John Picket and others, owners of the brig Albert, pursuant to the directions of the act of 3d March, 1847.

DECEMBER 28, 1848.
Read, and referred to the Committee of Claims.

OFFICE OF THE SOLICITOR OF THE TREASURY,
December 10, 1847.

SIR: I have the honor herewith to communicate the result of my examination of the case of John Picket and others, owners of the brig Albert, pursuant to the directions of the act of the 3d of March, 1847.

I have the honor to be, very respectfully, your obedient servant,

R. C. GILLET,
Solicitor.

Hon. R. C. WINTHROP,
Speaker of the House of Representatives.

Case of John Picket and others, owners of the brig Albert.

By an act passed the 3d of March, 1847, (chap. 83, session laws, p. 144,) it is provided "that the Solicitor of the Treasury be, and he is hereby, authorised and directed to examine the case of John Picket and others, owners of the brig Albert, and ascertain what is due to the claimants, (if anything,) upon principles of law and equity, and to report to Congress at its next session, the result of his examination."

The papers submitted to the Solicitor of the Treasury, under the above recited act, so far as they are deemed material, present the following facts:

The brig Albert, an American vessel, Jacob T. Woodbury, master, was seized at Bahia, in Brazil, on the 6th day of May, 1845, by Alexander H. Tyler, United States consul for that port, on a charge of having been employed in the slave trade, and placed in charge of Lieutenant Lawrence Pennington, comman lant of the United States brig Bainbridge, and sent to the United States for trial. On the 4th of June, thereafter, Captain Woodbury gave the consul and Lieutenant Pennington formal notice of abandonment of the vessel to the United States. His application to the consul, to aid him in purchasing passports from the authorities of Brazil, was refused. The consul offered to forward him to the United States as early as possible, for the purpose of being heard on the charges made by him. If he did not accept that offer, the consul informed him that he should refuse his assistance until he should receive instructions from the minister of the United States at Rio Janeiro, or the Department of State at Washington. No instructions from the minister or State Department on this subject are among the papers.

While at Bahia, on the last of June, the consul caused the brig to be appraised by Captains Rogers, Grossard, and Collins, who certified, under oath, that they had examined her sails and other apparel and hull, as she laid at anchor, and were of opinion her sails required considerable repairs, and should have a new bowsprit before proceeding to sea, and that the "vessel, with her tackle and apparel," was worth five thousand two hundred dollars.

Being dissatisfied with this appraisal, the consul requested Lieutenant Pennington to cause a survey and appraisal to be made. For this purpose, the latter detailed Lieutenant H. Walker, acting master C. M. Morris, and acting boatswain John Young, and C. W. Babbitt, acting carpenter, who valued her

Hull at	$1,212
Spars at	265
Rigging at	945
Sails at	474
Brig's furniture at	580
Cabin furniture at	84
Total	$3,570

After her arrival at Philadelphia, the United States district attorney filed a "libel of information," charging the brig with having been made use of in the slave trade, contrary to the true intent and meaning of the act of May 10, 1800.

The evidence taken on the trial of Captain Duling, who was indicted for piracy, in connexion with which it was charged the Albert had been made use of, was adopted as evidence on the trial of the Albert. The court, on the 31st of October, 1845, dismissed the libel, and awarded the vessel to the owners, who, notwithstanding Captain Woodbury's abandonment, claimed her. The court, in view of the circumstances which were developed on the trial, gave a certificate of probable cause. This protects the consul, and all others concerned in the seizure and detention, from prosecution by the claimants. Prior to the hearing, on the 23d of September, 1845, the claimants applied to the court to cause an appraisal of the said brig, her tackle, apparel, and furniture, and goods and effects on board, "with the view of having them restored," upon their giving a bond, with approved sureties, to the United States, in a sum equal to the value thereof, to abide the decision of the proper court thereon." On the same day, John L. Nicoll, James Simpson, and Michael Wise, after being sworn, reported to the court, that "we have carefully examined the above named brig Albert, and that the value thereof is fifteen hundred dollars." Whether this appraisal extended to anything beyond the vessel, or included the spars, rigging, sails, and furniture, does not appear.

It appears, by a certificate from Captains Collins, Rogers, and Grossard, that they did not include chronometers, nautical instruments, or charts, in their appraisal of the 10th June, 1845. No proof is found showing any material change in the condition of the vessel, her tackle, apparel, and furniture, between the appraisal in June, and that in September. Without proof, the undersigned cannot satisfy himself that, in three months, these depreciated in value, as insisted by the claimants, to the amount of three thousand seven hundred dollars. If the appraisal at Philadelphia related only to the hull of the vessel, and did not include her tackle, apparel, and furniture, then it differs from that of Lieutenant Walker and his associates, only in the sum of $288. The latter valued the hull this much less than the appraisers at Philadelphia.

Whether Captains Rogers, Grossard, and Collins had previously been engaged in ship building, so as to know the value of what they appraised, does not appear.

The occupation of the appraisers in Philadelphia is not in evidence, and no means of saying whether they knew anything concerning the value of vessels and their apparel, &c., is furnished.

The character and employment of the persons appraising, by order of Lieutenant Pennington, affords a reasonable guaranty that they were acquainted with the value of the things which they passed upon. This is particularly so in relation to the carpenter. From the details given by them, it is apparent they were accustomed

to consider such articles separated from each other. No difficulty has been felt in arriving at the conclusion that the appraisal made by them gives the true value of the brig, her apparel, &c., to wit: $3,570.

That the brig, her apparel, &c., depreciated in value between seizure, on the 6th of May, and restoration, on the 23d of September, is highly probable. But it is improbable that they did so to more than three-fourths of her value, as averred by the claimants, according to the first survey, and more than two-thirds according to the second.

The claims for demurrage are inconsistent with that made for the value of the vessel and interest thereon. The abandonment of the vessel to the United States, by Captain Woodbury, precludes all right on this account. From the conclusion to which the undersigned has arrived on another point in the case, he deems it not material to examine the various items claimed, including Captain Woodbury's board, counsel, &c., &c. He would simply remark that the whole facts necessary for a right understanding of the matters presented are not furnished in the usual form of evidence by disinterested witnesses. They are very far from establishing a loss to the amount of $12,986 35, claimed for interfering with property worth only $3,570, or $5,200, as averred by the claimants.

Upon the facts furnished to the solicitor, the question arises whether, upon principles of "law and equity," anything is due to the claimants.

The undersigned does not understand that, by the act of the 3d of March last, it was intended to change the general laws which are applicable to such cases. That act has nothing on its face indicating that a different rule should be applied to these claimants than to others under the general law. No rule whatever is specified in it except the "principles of law and equity." No new rule seems contemplated, but simply the application of old and familiar ones in general use. The Solicitor is required to report whether, under these, what, "if anything," is due to these claimants. If Congress had intended to introduce a new rule to guide him in performing his duty, it would have been specified in the act. So important a matter would not have been left to inference. When old and established principles are to give place to new ones the intention of the legislature to make the change is never left to conjecture. In the present instance the act itself is too clear and explicit to be the subject of doubt. It clearly refers to pre-existing rules of decision, when it uses the terms "principles of law and equity." The Solicitor is to inquire whether, by the "principles of law and equity," as they existed when the act passed, anything was due to the claimants. These are the principles which he understands are uniformly applied by the government in matters of accounts and in courts. No one will assume that principles not legal and equitable are authorized to be applied by any officer of the government or by any court. The act in question merely substitutes the Solicitor in the place of accounting officers, or of a committee of Congress, to ascertain whether by law anything is due, and requires him to

report the result of his examination to Congress. If he reports anything due, and Congress should approve, it would present a proper case for an appropriation. Under such a law the undersigned does not feel authorized to act upon rules of law and equity not in force and applicable before the act passed. He considers his duty limited to the application of pre-existing recognised rules, and that he has no authority to modify them or introduce and act upon new ones.

The question then arises whether, by the principles of law and equity, as they have long existed, and been applied, anything is due to the claimants from the United States.

No claim can rightfully be allowed unless authorized by some known rule of law. The Solicitor has not been able to find a law showing anything due to these claimants. The written argument of their counsel contains no reference to one. None such is believed to exist. This claim cannot rest upon the fact of the seizure and failure to condemn. Such cases occur almost daily in the United States courts. They do not lay the foundation for claims upon the government under any general principles of law or equity. Detention of property between seizure and restoration has not been held to constitute the basis of right to indemnity from the government under any recognised rule of law or equity. It does not exhibit any stronger claim for pecuniary reparation than that of persons deprived of their liberty upon charges which the government does not sustain. The injury to property cannot present a more forcible appeal for indemnity than that done to the person. Liberty is placed before property by the common voice. Accused persons are often deprived of their liberty, and rendered for the time incapable of aiding in the support of their families; yet, when tried, are often found not guilty. Still no indemnity is awarded them for their time, expenses, or counsel fees. The government does not even pay taxable costs, which the laws award against other losing parties. Though health is ruined, and property and reputation seriously injured, still the government makes no amends.

The law provides officers to conduct seizures and accusations, and it presumes they do their duty. It requires of them good faith and ordinary intelligence in all their official acts. When a seizure is made, or a prosecution commenced for a penalty, it infers that the officer has good cause for so doing. But to guard against ill faith and gross ignorance or mis-judgment, the laws of Congress provide a tribunal to pass upon these questions. The judge who tries the cause, after hearing, determines from the facts appearing upon the trial, whether, in his opinion, there was probable cause for the act of the officer. If he refuse such certificate, the officer is responsible, like any other individual, for damages occasioned by the seizure. The refusal of the judge to give it, in effect, determines that the officer does not deserve protection. The act is his, and not that of the government, and he must abide the consequences. If the court certifies there was probable cause, that certificate protects the officer from costs and from all suits growing

out of the seizure and prosecution. It in effect says the claimant has no legal or equitable remedy. On the question of granting or withholding this certificate, the prosecutor and claimant, or defendent, have a right to be heard. In this very case, the proctor for the claimants was present when a special application for the certificate was made. The parties, when the question is before the judge, know the consequences of his granting or refusing the certificate. The judge is bound to pass upon it, with the same consideration as he does other important matters before him. The question whether the claimant is entitled, upon principles of law and equity, to any damages for the act of the officer is distinctly before the court; the parties are heard, and it decides.

In the present instance, the judge determined that the facts disclosed to him on the trial, being the acts of the parties and their agents, were such as justly excited suspicion and distrust on the mind of the officer; and from their own conduct, as proved on the trial, there was probable cause for the seizure. The brig was deemed prima facie liable to seizure, trial and condemnation. Its being so was not the fault of the seizing officer, or the government, but of those having charge of her, and upon them must rest the consequences.

The certificate made by the court protects the consul, whose act is said to be so wrongful as to lay the foundation of the present claim. But if it had not been given, the United States would not have been liable to the claimants. There has never been a law, making the government responsible for such acts in law or equity. Their remedy would have been against the consul. What action Congress would have taken, if he had suffered for an act decided to have been illegal and without probable cause, is not for the Solicitor to determine.

The "principles of law" include positive statute enactments, and those principles of usage, sanctioned by the wisdom of ages, and which, by common consent, and with the concurrence or permission of legislative authority, control in the proceedings and adjudications of courts of law. These are to be found in written statutes, and in the unwritten law, usually denominated the common law, found in elementary books and reports of adjudged cases. Statute rights rest in positive enactments; those of the common law upon a duty which the claimant has the power to enforce. This duty results from the relation and acts of the parties, authorizing the one to exact and requiring the other to perform some legal obligation.

The "principles of equity" are those rules which are enforced in courts of chancery. Some of them are found in the statute books, but are principally drawn from adjudged cases in courts of chancery. These rules are as well defined and obligatory upon parties as those of law. A court of chancery is guided by the rules adduced from adjudicated cases, and has no right to introduce new ones affecting the rights or remedies of parties. Rules of equity are based on the supposition of a duty which one party owes to the other. This duty implies a consideration passing between the

parties, or the existence of some act equally affecting the interests of the claiming party.

"Principles of law and equity," thus understood, govern in our courts. Parties having rights resting on them, resort there to assert and enforce them. They present their facts, and the courts declare and apply the principles which govern.

The government differs from individuals in one essential particular. Without a special statute authorizing it, no suit can be brought against it. If this obstacle were removed, then the claimants in this case could resort to the courts of law to assert their legal remedies, and to the chancery tribunals to enforce those of equity. At law what description of suit would they bring to recover against the United States? It could not be in form ex contractu, because there has been no contract, express or implied. It could not be ex delecto, because the government has not touched the claimant's property, except by order of the proper court at Philadelphia, after information filed, and in pursuance of a legal warrant which protects those acting under it. The court then gave a certificate of probable cause, which shields all others.

The proceedings and decision in that case, on being plead or legally brought before the court, would bar all claim at law.

Upon what principle of equity could a bill against the United States be sustained? No consideration has passed between the parties, nor agreement made between them. The United States have performed no illegal act affecting the claimants, to lay the foundation of a claim. The consul, without its instructions, seized and sent home the vessel, and the district attorney filed a "libel of information" against the brig, and she was taken into custody. The act of the consul is protected by the certificate of the court. Those of the district attorney and marshal are strictly legal. Then, under what act of the government could the claimants successfully assert any right in chancery? It will not be pretended that a legal act lays the foundation of a claim in equity. Such a position cannot be sustained by reason or authority. The claimants have not proved an illegal one. If a bill could not be sustained for a legal act by the government, and no illegal one has occurred, it is submitted that none could possibly be sustained.

By omitting to establish a new principle in behalf of these claimants, it is presumed Congress did not intend to select them as objects of special favor, and place them on a footing different from others, whose fortunes have suffered by unfounded accusations. If they had designed to declare a new principle, they would have done it in a manner to allow all others, coming within it, to be benefitted by its provisions. They must have been aware what a wide door such a provision would open. The principles contended for by the claimants, if fully carried out, would require the government to respond in money to every person indicted under the laws of the United States and acquitted, for all his losses in time and money, including counsel fees, with interest. The same principle would extend to every case where the claimants of property seized have been successful in their efforts to defend. This is not all:

large anticipated profits from labor expected to be performed would have to be paid for, with interest. Aware of the consequences which would naturally result from such legislation, Congress, in the act of the 3d of March last, seem to have confined the Solicitor to the application of the present law to the facts presented. By that law, he believes there is nothing due from the United States to these claimants. He commenced the examination of this case with strong inclinations in favor of reporting something due to the claimants; but these he was compelled, by unbending principles, to yield. His reflections brought him, without hesitation or doubt, to a different conclusion, and he is bound so to report.

All which is respectfully submitted.

R. H. GILLET,
Solicitor.

DECEMBER 10, 1847.